



April 26, 2000

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2000-1615

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134558.

The Texas Department of Insurance (the "department") received two requests for copies of all reports filed by Nationwide Insurance ("Nationwide") pursuant to the assurance of voluntary compliance agreement ("AVC") between Nationwide and the department¹. Although you do not assert any exceptions to disclosure of the submitted information, you advise this office that the requested information might involve the proprietary or property interests of Nationwide.² You have submitted a copy of your letter notifying Nationwide about the requests as required by section 552.305(d). *See* Gov't Code § 552.305 (permitting

¹We note that one of the requestors asked for all reports that Nationwide has submitted to the department whereas the other requestor asked for all reports Nationwide has submitted since January 1999.

²We note that you have withdrawn your request for an opinion regarding "in force" homeowners policies. Therefore, we will not address information pertaining to "in force" homeowners policies. Further, in your original brief, you claimed that portions of the requested information pertaining to automobile insurance were excepted from disclosure under sections 552.101 and 552.107(2) of the Government Code pursuant to a Temporary Restraining Order ("TRO"). However, in your letter of April 12, 2000, you have withdrawn the request for an opinion regarding the applicability of sections 552.101 and 552.107(2) to the submitted information because you contend that the TRO may not be applicable to the requested information. In your letter of April 12, you expressly state that you are not withdrawing your request for an opinion regarding the proprietary nature of the information.

interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Nationwide has submitted a brief in which it asserts that portions of the requested information are excepted from disclosure by sections 552.101 and 552.110.³ We have considered the exceptions Nationwide claims and reviewed the submitted representative samples of information.⁴

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). Although you submitted information to this office with your letter of February 24, 2000, you also submitted additional information with your letter of April 4, 2000, more than fifteen business days after receiving the request. Therefore, the department has failed to comply with section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Nationwide claims that portions of the requested information are confidential pursuant to a Temporary Restraining Order ("TRO"), and that the information implicates its proprietary interests. Therefore, we conclude that there exists a compelling reason for this office to address these arguments. *See* Open Records Decision Nos. 552 (1990), 150 (1977) (compelling reason for withholding may be shown

³We have also reviewed the correspondence sent to this office by one of the requestors and Birny Birnbaum, an interested party. *See* Gov't Code § 552.304 (providing that member of public may submit written comments stating reasons why information should or should not be released).

⁴In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

by demonstration that information is made confidential by another source of law or affects third party interests).

First, we address Nationwide's contention that the TRO excepts automobile insurance data from disclosure under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.107(2), rather than section 552.101, applies to information protected by court order. Section 552.107(2) provides that information is excepted from required disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). The TRO was issued by a district court in connection with a pending lawsuit filed by Nationwide against this office and the department. The TRO enjoins the department from releasing to any person or entity any of the "Quarterly Market Reports submitted by any of the Nationwide Plaintiffs to the [department], including any of the information contained in such Quarterly Market Reports, until further order of this Court." Due to a recent stipulation by the parties to the lawsuit, the TRO is to remain in effect until July 5, 2000.

Contrary to Nationwide's contention, you advise that the TRO *may* be inapplicable to the requested information. Because a pending lawsuit exists and the department and Nationwide have provided this office with conflicting interpretations of the applicability of the TRO, we conclude that the district court is the proper authority to determine the applicability of the TRO to the automobile insurance data. *See* Open Records Decision No. 560 (1990) (concluding that forum court was the proper authority to determine the court's intent in a stipulated modification in a pending lawsuit). Thus, we defer to the judgment of the district court with regard to the applicability of the TRO to the requested information.

We turn now to Nationwide's assertion that the information at issue is excepted from disclosure under section 552.110.⁵ Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know

⁵As noted earlier, the department has withdrawn its request for an opinion regarding "in force" homeowner policies. Therefore, our analysis of Nationwide's section 552.110 claim pertains exclusively to information reflecting Nationwide's sales of new and in force automobile insurance, and new homeowner's insurance, as those sales are reported by zip code or by grouping of zip codes ("zip code data").

or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information is excepted as a trade secret

if a *prima facie* case for exception is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, where no evidence of the factors necessary to establish a trade secret claim is presented we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

After examining all of the arguments and the submitted documents, we conclude that Nationwide has presented a *prima facie* case that the zip code data at issue constitutes trade secrets under section 552.110(a). We note, however, that an interested party has raised relevant but disputed factual and legal issues, including whether the zip code data at issue has been publicly revealed. If the information has already been publicly revealed, then Nationwide cannot protect the information from further disclosure as trade secret information. This office cannot resolve disputes of fact in the opinion process. *See* Open Records Decision No. 609 (1992). We, therefore, defer ruling on the issue of whether the zip code data are excepted as trade secrets under section 552.110. We refer this matter back to the department to make a finding as to whether it has previously released the zip code data to the public. *See id.* If the department finds that it previously released the zip code data, then the department may not withhold the information under section 552.110(a). If the department determines that it has not previously released the zip code data, then it must withhold the information as trade secrets under section 552.110(a).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

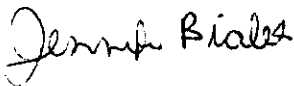
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental

body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.-Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/nc

Ref: ID# 134558

Encl. Submitted documents

cc: Mr. Thurman R. Jones
Texas Publishers Association
2730 Stemmons Freeway
1202 Tower West
Dallas, Texas 75207
(w/o enclosures)

Mr. Aissatou Sidime
San Antonio Express-News
P.O. Box 2171
San Antonio, Texas 78297-2171
(w/o enclosures)

Mr. Jack M. Cleaveland, Jr.
Thompson, Coe, Cousins & Irons, L.L.P.
200 Crescent Court, Eleventh Floor
Dallas, Texas 75201-1853
(w/o enclosures)

Mr. Birny Birnbaum
The Center For Economic Justice
1704½ South Congress, Suite P
Austin, Texas 78704
(w/o enclosures)